FILED
AUG 1 4 1958
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 208

JOHN HENRY MOORE,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF
ST. LOUIS, a Corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ROBERT C. ELY,
212 Union Station,
St. Louis 3, Missouri,
Attorney for Respondent.

LYMAN J. BISHOP,
212 Union Station,
St. Louis 3, Missouri,
Of Counsel.

INDEX.

	Page
Statement of the case (Point I)	1
Answer to statements in Petition (Point II)	4
Limitation of action to be taken by this Court (Point III)	12

Cases Cited.

Milom v. New York Central R. Co., ... U. S. ..., 2 L. ed. 2d 529	2
Terminal Railroad Association of St. Louis v. Barnett, 345 U. S. 956, 73 S. Ct. 938, 97 L. ed. 1377	2

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. .....

JOHN HENRY MOORE,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF
ST. LOUIS, a Corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

STATEMENT OF THE CASE.

We will refer to Petitioner as "plaintiff" and to Respondent as "defendant." Plaintiff was an employee of defendant railroad and was injured in the course of his employment. His cause of action is governed by the provisions of the Federal Employers' Liability Act.

Our chief purpose and function herein is to set facts straight. We cannot disagree with the basic law—instead we rely upon it, because in each instance it is pointed out

that there must be negligence of the railroad before the employee can recover for his injuries. In view of the uncontroverted facts of this case, we are content that this Court will agree with our State Supreme Court that there was no negligence of defendant.

This Court has not in every instance granted certiorari and reversed in cases under the Federal Employers' Liability Act where judgment has been entered for defendant in a court below. Witness the cases of:

Terminal Railroad Association of St. Louis v. Barnett, 345 U. S. 956, 73 S. Ct. 938, 97 L. ed. 1377;
Milom v. New York Central Railroad Co., ... U. S. ..., 2 L. ed. 2d 529.

The facts basic to plaintiff's accident are that he was in Union Station, St. Louis, Missouri, pulling a wagon along a platform which lay between two tracks (R. 42). To his left was a standing train—to his right was a moving train (R. 49), and his intention was to move to a point where he would unload onto the wagon some baggage from a certain car of the moving train, after it came to a stop (R. 32, 69).

Other employees were performing similar functions on that same platform, either moving or standing at various points along the 1800-foot platform (R. 309). Only two of the other wagons enter into the picture of plaintiff's accident, as will be seen in this brief statement of the accident.

Plaintiff was moving along the right-hand side of the platform (R. 49), and he came to a point where a **standing** wagon (No. 1) blocked his way on that side (R. 68). Since he was headed for a point several hundred feet further north up the platform (R. 57), it was necessary for him to go around the standing wagon on the left side (R. 68).

At that time another wagon (No. 2) was some feet ahead of him and to his left and was moving in the same direction as plaintiff (R. 128, 68). That is the picture which confronted plaintiff, and those two wagons were the only ones which in any way affected plaintiff's movements or his accident.

There was one wagon (R. 131, 132), and possibly more, behind plaintiff, but they had no connection with his movements or his accident; and there were some wagons further up the platform as far as 60 feet (R. 254), which wagons had no influence whatsoever on what occurred. The closest of any wagon to plaintiff was the one 30 feet behind him (R. 71, 72, 133). According to the evidence and the way that plaintiff described his movements, the accident would have occurred in exactly the same way if there had been no wagons within sight except his and the two mentioned above.

Plaintiff's accident occurred when he turned to his left to fall in line with the moving wagon (R. 106), in order to pass to the left of the standing wagon. Plaintiff had made such a turn on many previous occasions without catching his wagon on an adjacent train (R. 108); and on this occasion he thought he was turning safely (R. 128), but he turned too sharply so that the rear of the wagon (pivoting on center wheels, R. 38) swung into the moving train to his right. The train then pushed the wagon, and plaintiff was pinned against the standing train to his left and was injured (R. 62, 63).

Plaintiff testified that if the moving wagon had been further along the platform, he "could have made that turn easy" (R. 125), and he also testified that he could have stopped his forward movement in a step or two (R. 102). The result of this is that had plaintiff hesitated a moment to let the moving wagon clear the way, plaintiff

would have "made that turn easy" (R. 125). The fact that plaintiff did not hesitate and the fact that he did make a sharper turn than necessary, considered either together or separately, seem to be the only causative factors in the case.

Our State Supreme Court found no negligence under these simple circumstances, and we believe that in this instance this Court will agree with that decision. The decision of the state court is reported at 312 S. W. 2d 769.

II.

ANSWER TO STATEMENTS IN PETITION.

There are certain statements and arguments made by plaintiff in his Petition to this Court, which statements must be corrected and which arguments must be answered in order that a clear understanding may be had of the case and its probative facts. For convenience, we will locate each by page number of the Petition.

A.

Page 8 of the Petition (middle of last paragraph): It is stated that plaintiff saw three or four wagons moving "between him and the bull wagons" (R. 51). That statement is **not** borne out by page 51 of the Record. The evidence referred to was stricken by the Court, and even if not stricken it does not say that there were any wagons "between" plaintiff and the bull wagons, nor does plaintiff anywhere claim such to have been a fact. Instead, plaintiff testified at R. 53, 54, that except for the two moving flat wagons **opposite** the standing bull wagons, the wagons were all north of the bull wagons or south of plaintiff—**not** in between.

B.

Page 9 of the Petition (last paragraph): It is here stated, "There was evidence that there were as many as 7 flat wagons in the area between the north elevator and the standing bull wagons at the time of petitioner's (plaintiff's) injury (R. 137, 270, 299)." That statement is **not** borne out by the record pages listed, and it should also be noted that the distance referred to is 90 feet (R. 46, 47, 62—bull wagon at third post from elevator, and posts 30 feet apart), making considerable space for wagons to be located. In any event, plaintiff's testimony demonstrates that of all possible wagons found on the platform, only one was within his intended pathway (R. 109) which was the closest of the two moving flat wagons opposite the standing bull wagons, and the others had no bearing on his accident.

To demonstrate that the statement by plaintiff quoted above is **not** correct by the Record, it is necessary to analyze the testimony on each of the three pages cited:

(1) **R. 137**: Witness Harold Robinson guessed there were four flat wagons after being asked: "Q. Now, north of these two tractors or bull wagons, was there any other vehicle?" If they were **north** of the bull wagons, they were not between the north elevator and the bull wagons, because the north elevator was **south** of the bull wagons."

(2) **R. 270**: Witness Claudy Glasgow testified that there were 5 or 6 flat wagons in the area. However, the witness was testifying about a time considerably before plaintiff was even on the platform. This witness came up the elevator before plaintiff (R. 267) and that is what he saw when he arrived on the platform. After seeing this and before plaintiff's accident, Glasgow had walked from the elevator the ninety feet to bull wagons (R. 46, 47, 62) and 100 feet further (R. 279), a total of 190 feet, and all of that time those flat wagons were moving also (R. 138).

The locations of the flat wagons described by this witness were entirely different when plaintiff arrived and later when his accident occurred.

(3) **R. 299**: Witness Emerson Long describes the location of flat wagons at the time of his arrival on the platform, which was **after** the accident (R. 294). He testified that there were four to six wagons north of plaintiff, **but** he further stated that those wagons included the standing bull wagons and that the others mentioned were **north** of the standing wagons (R. 299); so **none** of the wagons described by this witness were "in the area between the north elevator and the standing bull wagons", as is claimed in plaintiff's Petition (pages 9 and 10).

Our reason for correcting this statement by plaintiff in the Petition is that throughout the Petition the inference is being made by its author that there was a congestion of many wagons in a small area and that because plaintiff was hemmed in he had no choice but to turn as he did, and an accident was inevitable. The facts of the Record do not bear out such an argument, and plaintiff himself in describing the cause made **no** claim that a congestion of many wagons caused his accident at all. We will demonstrate below just what plaintiff himself said happened, and it does not include any inference that any but the two mentioned wagons (No. 1 and No. 2) had anything to do with his accident.

C.

Page 16 of the Petition, middle paragraph, lists five conditions which allegedly caused plaintiff's accident. We will answer each separately:

(1) This Court has never indicated that it will hold that it is negligence to require men to work in an area where trains are moving. This Court knows that such a holding would be tantamount to saying that it is negligence to run

a railroad. There is no evidence of any overhang which could be sufficient to lend itself to a narrowing of the platform. And there is no evidence that the posts (which supported the roof) caused plaintiff any inconvenience in turning his wagon (R. 108), nor does the statement in the Petition favor us with any page references from the Record to bear out such statements.

(2) The wagon furnished to plaintiff was one which he could easily turn from one side of the platform to another without danger of contacting a train alongside the platform (R. 108, 109). The evidence does not indicate that the length of the wagon, as compared to the width of the platform, had anything whatsoever to do with the fact that plaintiff moved his wagon so that it was struck by the train.

(3) Calling the platform "overcrowded" is not justified by the evidence concerning wagons that are pertinent to the issues. Only two other wagons had any connection with plaintiff's movements—the nearest standing bull wagon and the moving flat wagon which plaintiff intended to follow. All other wagons were out of the picture entirely. Certainly there were other wagons on that platform, but the platform is 1800 feet long (R. 309) and can easily accommodate many such wagons. Undoubtedly, there were other wagons on other platforms in the station, and if they had been described in the evidence and counted, they could be added to the figures suggested by plaintiff in this Petition, but they would have no more to do with plaintiff's accident than did any other wagons on the platform involved, except the two wagons which were ahead of plaintiff. Under Point II, B, we have fully discussed the claim in this Petition that there were seven other wagons in the area, and we have shown that those wagons were not in the positions which the Petition assigns to them, nor were they in any sense involved in the accident.

(4) Requiring plaintiff to walk on a platform alongside a moving train is not negligence. This is the same as the allegation in subparagraph (1) above, and to require plaintiff to walk on such a platform is no different from the situation where people every day walk on sidewalks alongside of moving automobiles. We cannot believe that this will be counted as negligence.

(5) The statement that defendant failed to furnish plaintiff with a reasonably safe path begs the question. It can only add a number, but not strength, to the argument.

In the last paragraph on page 16 of the Petition, plaintiff gilds the lily when he says that "given the facts in this record, an injury was almost inevitable." An injury did occur because of what plaintiff did on the day in question, but the cause was not negligence of defendant in any sum whatsoever—it was plaintiff's failure to act prudently that caused his accident. His actions did produce an injury to himself; therefore, his actions made an accident inevitable, but certainly the situation which confronted plaintiff was a common, ordinary, every-day condition, and until plaintiff made his imprudent moves no accident was inevitable.

D.

Page 19 of the Petition, last paragraph, makes three separate attacks on the state court's opinion. We will answer each in order:

(1)-(a) The conclusion by the state court that the wagon ahead of plaintiff's did not interfere with plaintiff's operation of his wagon was not founded solely on the plat (Plaintiff's Exhibit No. 8, R. 44, 45) introduced in evidence by plaintiff but was a reiteration of the facts that plaintiff had outlined in his testimony, and the plat and cut-outs were a demonstration of what plaintiff stated in his testimony. Plaintiff testified that the wagon was approximately 30 feet ahead of him (R. 71, 72, 128) and that he intended

to follow it (R. 106). At the request of his own counsel, he positioned the scale cut-outs of the wagons on the scale plat as a visual demonstration of his oral testimony (R. 53), and the state court refers to the plat as a means of demonstrating what plaintiff said happened.

(1)-(b) The state court concluded that the platform was not "overcrowded" and the term was there used in the sense of being congested to a point where the presence of other wagons interfered with plaintiff's movement of his wagon. Plaintiff had demonstrated the positions of the various wagons involved by placing the cut-outs on the plat "in the position they were" (R. 53). The state court accepted plaintiff's version and properly held that it did not constitute "overcrowding." The author of the Petition states that this ignores the "evidence that there were as many as 7 flat wagons in the area" (R. 137, 270, 299), but the Petition does not say what area, the platform being 1800 feet long (R. 309), and we have already shown under Point II, B, above, that the Record pages 137, 270 and 299 do **not** show that there were seven flat wagons close by plaintiff.

(1)-(c) There was no evidence "that the crowding of the platform made it difficult, if not impossible, for petitioner (plaintiff) to turn his flat wagon and 'keep it in the clear'" (R. 125, 128, 171) (top of page 20 of Petition); therefore, the state court could not be said to have "disregarded" such evidence. Witness what each of those Record pages shows:

R. 125: A leading question by plaintiff's counsel used the word "difficult," but plaintiff's answer does not adopt the word, and the answer merely restates that at the moment of plaintiff's turn the moving wagon had not yet moved up quite enough for plaintiff to make an "easy" turn.

R. 171: Plaintiff's witness Robinson used the word "crowded," but obviously in the sense that there was a flat wagon up ahead of plaintiff and if plaintiff attempted to move right in with the other wagon it would then become crowded. He did not say that the condition "made it difficult" or "impossible" for plaintiff to move to the left and stay in the clear. In fact, the witness immediately afterwards testified that plaintiff "had a clear right of way to swing all the way over to the other side of the platform," and then said, "But up ahead he wasn't in the clear" (R. 173).

R. 128: Plaintiff's testimony on this page tells the whole story:

> "A. Well, I did think I was turning safely, which I tried, and if it hadn't been for this wagon in front of me I could have made it easy.
>
> Q. What wagon was that?
>
> A. This flat here in front.
>
> Q. If it hadn't been for that you could have made what easily?
>
> A. I could have made it in there and got my wagon in the clear easy.
>
> Q. You could have gotten in the clear easily?
>
> A. Yes, sir.
>
> Q. And that's what you were trying to do?
>
> A. Yes, sir, that is what I was trying to do" (R. 128).

Add to the above quote this testimony of plaintiff:

> "Q. But it is quite possible, isn't it, to turn one of those flat wagons from one side to the other without catching it onto a train?
>
> A. Yes, sir, I have lots of times.
>
> Q. And you did that back here, didn't you?
>
> A. Yes, sir.

Q. And you have done it lots of times, like you say?
A. Yes, sir" (R. 108).

* * * * * * * *

"Q. Now, just prior to the time you made this turn from the east side of the platform toward the west do you recall whether or not those flat wagons that were on the west side were moving or not?

A. I ain't for sure but I believe they were moving" (R. 68).

* * * * * * * *

"Q. Going at the speed you were going there, pulling that empty truck, within what distance could you have brought it to a stop?

A. Well, I could have stopped right away, no faster than I was going.

Q. Right away?

A. Yah.

Q. Right now, you indicate?

A. Not like the pop of your hand but you could stop in a step or so" (R. 102).

The above quotations are the crux of the whole situation—they are plaintiff's own statements of **all** causative factors. None of the other wagons which are mentioned in plaintiff's Petition for Writ of Certiorari are intimated as having one iota of a part in the scene except the standing wagon which plaintiff was going to pass. This brings us back to the beginning of our presentation in this brief—it is the whole case for plaintiff and for defendant. Again we say that if plaintiff had hesitated a moment to permit the moving wagon to go further ahead, or if he had not inadvertently turned as sharply as he did the accident would not have occurred. This is not **contributory** negligence, because there was no negligence chargeable to defendant.

We most respectfully submit that the Petition for Writ of Certiorari should be denied.

III.

LIMITATION OF ACTION TO BE TAKEN BY THIS COURT.

Finally, in the Prayer of the Petition, ending on page 24, plaintiff asks that the judgment be reversed with directions to affirm the judgment of the trial court. The tail end of that request ignores that there are many questions concerning error in the trial of the case, which questions were not decided by the State Supreme Court. If this Court grants certiorari and decides to reverse the present judgment, it should not direct more than that the cause be remanded with directions to proceed further in accordance with the decision of this Court, and the questions of error should then be decided by the state court. We honestly believe that this Court will not grant a reversal in this case.

Respectfully submitted,

ROBERT C. ELY,
212 Union Station,
St. Louis 3, Missouri,
Attorney for Respondent.

LYMAN J. BISHOP,
212 Union Station,
St. Louis 3, Missouri,
Of Counsel.